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# The Judicial System of the German Empire With Reference to Ordinary Jurisdiction\*

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**The Making of the German Civil Code.** Up to the first of January 1900, there existed in Germany an antiquated and completely confused situation in regard to the civil law.

In Prussia three different civil codes were in force: the Allgemeines Landrecht of 1794 in the old Prussian territories of 1815, in some parts the Gemeines Deutsches Recht, a mixture of Roman, Germanic, and Canon Law, and in the territory west of the Rhine the French Civil Code. Baden had her Landrecht, which was mainly the same as the French Civil Code; the Kingdom of Saxony had its own code of 1863. In Schleswig-Holstein the Danish law of Christian V of 1683 was law; a small part of Bavaria was under the Austrian Code of 1811; the major portion of the empire, Central Germany, was under the Roman law as "received" and modified by ancient Germanic customs. All these laws were modified by local customs and statutes to such an extent that different systems of law were administered in the same political units, even in the same city.

This terrible confusion had, long before the foundation of the new German Empire, awakened the desire of greater unity among the systematic German jurists. But before the political union of Germany, no attempt had reached a goal. The history of the German civil code is the history of German political unity. The desire for legal unity began with the longing for political unity, i. e. after the Napoleonic wars at the beginning of the 19th century.

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\*From a forthcoming work on the "Government of Germany," by the author. The article is published by the courtesy of the World Book Company.

It was in the year 1814 that a German professor of jurisprudence, Thibaut, wrote: "I am of the opinion, that our law \* \* \* \* needs a complete and quick change, and that the Germans cannot be content in their civil relations, unless all German governments try to bring into effect with united strength, the publication of a Code for all Germany, which is removed from the arbitrariness of the several states."

Thibaut, the patriotic politician, was opposed by the famous founder of the historical school of law, Savigny, who denied the necessity as well as the possibility of creating a common Code for the German Empire at that time. He expected a unity of law from the very gradual organic development of the science of jurisprudence. The universities were, in his opinion, the uniting force for a common German Code.

The great theoretical dispute which arose between these two jurists furnished the arguments for and against the legal unity of Germany in all future discussions. Looking back, after the work is now completed, we may say that right and wrong was on both sides. Thibaut, as an ardent progressive reformer, had overestimated the popular desire for German legal unity. One swallow does not bring about the summer. He was right in the emphasis on the national and practical necessity of a Code. Savigny, on the other hand, relied too much on the power of his historical method and the uniting power of the science of jurisprudence. He did not recognize the power of national feeling in creating legal reforms. However he was right, when he said that the time was not ripe for legal unity.

The German Confederation did not pay any attention to Thibaut's suggestions and was hardly the appropriate State to take a unification of the German law into its hands, since it had no general legislative power.<sup>1</sup> How deeply however the necessity for a common law of Germany was felt can be seen by the repeated attempts to create common codes even with these imperfect means. In fact two attempts led to a practical result. In 1847, a Code on Bills of Exchange, and in

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<sup>1</sup> The project for an Imperial Constitution of 1849 provides in Art. XIII, § 59, for a common Code in civil and criminal law and procedure, in bills of exchange and commercial law.

1859, a Commercial Code went into effect for the whole Confederation.<sup>2</sup> The draft of a Code of Obligations, prepared without the participation of Prussia, was never enacted, since the Austro-Prussian War of 1866 broke out on the same day on which it was finished.

The idea of a common German law had now gradually attracted a number of warm friends, who time and again proposed a general common codification of all law for the North German Federation. However for the time, only criminal law, legal procedure, bills of exchange, and commercial law were left to the legislation of the North German Federation. The representative Lasker in the Reichstag, was especially active in bringing in bills for a common codification of the civil law.

Finally, in the year 1873, a bill of Lasker's to amend Art. IV no. 13 of the Constitution so as to include the whole civil law, was made a law of the Empire. The amendment, made on the 20th of December, was a most precious Christmas present to the German people.

The Bundesrat or Federal Council then appointed a Commission of five prominent practical jurists for the settling of some preliminary matters necessary for the preparation of the draft, and for laying down the principles for the work of the general commission.<sup>3</sup>

This general Commission consisted of 11 members, leading professors of jurisprudence and judges, representing the different systems of law in existence at that time. The drafting of the different parts of the Civil Code was given to five members as "redactors" or editors. After seven years of individual work, the commission came together as a body and discussed the drafts. In the year 1887, a project was transmitted to the Chancellor and published by him in 1888 together with a summary of the existing situation and reasons for the changes recommended by the commission.

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<sup>2</sup> It might be noted that the first attempts toward an International Private Law began with a common codification of Bills of Exchange.

<sup>3</sup> For the work of the Commission in detail, see: "Die Ausarbeitung des Entwurfes eines bürgerlichen Gesetzbuches." "Herausgegeben von der Redaktion des Deutschen Reichs- und Königlich Preussischen Staats-Anzeigers." Berlin, 1877, pp. 1-11.

The publication had the purpose of eliciting suggestions and criticisms from all parts and all classes of the German Empire, so as to bring the work of the experts into harmony with general public opinion. And indeed the literature produced was tremendous. The strongest opposition came from the Germanistic School led by the distinguished Berlin Professor, Gierke, who wished a fuller recognition of the German Customary Law.

As a result of these criticisms a new commission of 22 members, representing all interests in the land, was appointed. Each draft of the Code was published, and after the criticism of the public, thoroughly revised by still another commission.

In January 1896, the draft of the Code and the Introductory Law was completed and placed on the table of the Reichstag together with an official memorandum, called *Denkschrift zum Entwurf eines bürgerlichen Gesetzbuches*, or memorandum for the project of a Civil Code.

By the Reichstag the project was, after the first reading, transmitted to a committee of twenty-one members from the different parties. In June, the committee reported to the House. The discussions in it were characterized by the dignified attitude of cool critics aside from all considerations of party politics. July 1, 1896 the bill was passed by a very large majority with only one amendment.

The Federal Council adopted the Code on July 4th and the law was published on August 18th.

It went into effect January 1, 1900 together with an Introductory Law, a Law on Judicial Organization, and a Law on Civil Procedure.

The making of the German Civil Code is perhaps the most remarkable example of brilliant, thorough, constructive legislation in existence. It was rendered possible by the high idealism of the mass of the German people, their patience and confidence in their jurists. It was the work of highly trained experts, subjecting themselves to general public opinion for the welfare of their fatherland. The German Civil Code is truly a child of all united Germany, a striking illustration of the effect of idealism in politics. It serves, as an English writer observes, as a standing object-lesson to all states that

are looking forward in the future to a scheme of codification, and the Germans may well be proud of the labours which for twenty-two years were devoted to its consideration.<sup>4</sup>

**Outline of the Civil Code.** The German Civil Code is generally recognized by foreign jurists as a masterpiece in jurisprudence if not the greatest Code since Justinian. Thus Professor Maitland, the eminent English jurist, says:<sup>5</sup> "The German people have brought that law up to date and are facing modern times with modern ideas, modern machinery, modern weapons." "It is the most carefully considered statement of a nation's laws that the world has ever seen."<sup>6</sup> And E. M. Borchard,<sup>7</sup> an American specialist on German law, praises the German Civil Code with the following words: "German codification truly exemplifies a power of legal expression with which Bryce credits the Roman jurists—the power of so framing general rules as to make them the expression of legal principles, and of working out these rules into their details so as to keep the details in harmony with the principles."

It is impossible and not essential in a brief article to give a detailed account of the contents of the Civil Code.<sup>8</sup> A systematic outline is considered sufficient to give the foreign student a general idea of the great German Code.

The 2385 paragraphs of the B. G. B. (the official abbreviation for *Bürgerliches Gesetzbuch*) are grouped into five books, of which the first contains general principles and rules, (*Allgemeiner Teil*, 1-240), while the second book deals with the "law of obligations," (*Recht der Schuldverhältnisse*, 241-304), the third with the "law of things," (*Sachenrecht*, 854-1296),

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<sup>4</sup> A. P. Higgins, "The Making of the German Civil Code," in "Journal of the Society of Comparative Legislation." New Series No. XIII.

<sup>5</sup> Independent Review, 1906, p. 219.

<sup>6</sup> Maitland in the introduction to his translation of Gierke's "Political Theories of the Middle Ages."

<sup>7</sup> Guide to the Law and Legal Literature of Germany, by Edwin M. Borchard. Government Printing Office, 1912.

<sup>8</sup> The best English translation of the Civil Code is that of Chung Hui Wang. The German Civil Code. Translated and Annotated with an Historical Introduction and Appendix. London, 1907. The best treatise in English is that by E. J. Schuster. The Principles of German Civil Law. Oxford, 1907.

the fourth with the "family law," (Familienrecht, 1297-1921), the fifth with the "law of inheritance," (Erbrecht, 1922-2385).

This classification, peculiar as it might seem to Anglo-Saxon jurists,<sup>9</sup> is based upon the arrangement of the older German systematic books on modernized and Germanized Roman law, and it was therefore familiar to the German lawyers and judges. Book I is divided into seven sections dealing with, 1, Persons, (natural and juristic, e. g. the subjects of rights); 2, Things, or to employ a more exact definition, corporal objects (movable and immovable things, things fungible and not fungible, "vertretbare Sachen," consumable and permanent things, essential and non-essential component parts, accessories, fruits and "usufruct" or profits); 3, Juristic Acts, (legal capacity, declaration of intention, contract, condition and limitation of time, original and delegated legal agency, ratification); 4, Periods of time; 5, Prescription, (in Roman law termed as *longi temporis praescriptio*); 6, Exercise of rights, self-defense, and self-help; 7, Security and bail.

The second book, dealing with obligations is also subdivided into seven sections. They deal with the nature and scope of obligatory rights and duties, different types of obligations, their creation and extinction, transfer of claims, assumption of debt, joint debtors and creditors. Section seven of the book deals in twenty-five titles with particular kinds of contracts as e. g. purchase, sale, exchange, gift, leases, rents, loans, brokerage, partnership relations, etc.

The third book, which deals mainly with the law of real property, is divided into nine sections. After a general introduction on the nature of real rights or property this book takes up possession and registration of land, ownership of movable and immovable things, rights connected with it and ownership, heritable building rights (Erbbaurecht), servitudes, real right of preemption, (dingliches Vorkaufsrecht), perpetual charges on land, mortgage, land charges and annuity charges.

The fourth book, on family law, is divided into three sections and regulates the personal and financial relations between engaged and married people and relatives, including the law of guardianship.

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<sup>9</sup> See, e. g., E. J. Schuster, "The Principles of German Civil Law."

The fifth book regulates in nine sections, inheritance, taking up the order of succession of heirs, the legal status of an heir, the testament, contract of inheritance, compulsory share, disqualifications for inheritance, renunciation of inheritance, certificate of inheritance and purchase of inheritance.

The German Civil Code was introduced by the "Einführungsgesetz" or Introductory Act of August 18, 1896, which is of great importance. This law contains general provisions, the relation of the Civil Code to the laws of the Empire and the States, and transitory provisions. Art. 7-31 of this law contain the so-called international private law, which regulates the legal status of Germans abroad and of foreigners in Germany.

In order to harmonize the state law with the imperial civil law, to make transitory provisions, and to regulate the matters left to the legislation of the several states, these states passed "Ausführungsgesetze" or Acts to carry into effect the Civil Code.

**The Criminal Code.** The criminal law was the first field of law regulated by imperial legislation. It dates back to the 31st of May, 1870. Since that time legislation in criminal law of the several states is restricted to violations of regulations concerning taxes, fishing, hunting, forestry and mining.

The Criminal Code of the German Empire<sup>10</sup> is divided into two parts, one containing the general principles and the other the particular punishable crimes.

Subject to punishment under this criminal law are all persons, citizens and foreigners living in Germany. German citizens may be punished also for certain crimes committed abroad, i. e. for treason, crimes of *laesae majestatis* and crimes committed in official service.

Only the completed criminal act is punished to the full extent. The punishment for an attempt is always considerably milder. In case of mere trespass an attempt is not punished at all.

Partners in and instigators of a crime are punished like the

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<sup>10</sup> It might be mentioned that a new Criminal Code is being prepared but that its preparation will probably continue for several years, since the well known German thoroughness is applied in preparing it.



one who actually committed the crime. Those who assisted receive a milder punishment.

Persons who are insane, or those who act in self-defense, or who do not appreciate the consequences of their acts, or children under 12 years of age are not punished. The latter, however, are subject to a special corrective education under official supervision. Youthful criminals of the ages between 12 and 18 are punished very mildly and their case is now usually brought before a special Juvenile Court created after the American model.

The public prosecutors are obliged to bring every criminal offender of whom they hear before a court except in a few cases of minor crimes, where the direct interest of the state is not involved. In these cases the prosecutor takes a case up only if it is brought before the court by the party concerned.

A crime cannot be punished if a certain time has elapsed since it was committed. Misdemeanors come under the statute of limitation after three months, severer crimes after three to twenty years.

The criminal acts are divided into three classes: Verbrechen or felonies, Vergehen or misdemeanors, and Uebertretungen or trespasses. A felony is an act punished with capital punishment, imprisonment in a penitentiary or fortress for more than five years. A misdemeanor is punished with incarceration in a fortress for less than five years, or with incarceration or fine of more than 150 Mks. A trespass is punished with arrest or fine of less than 150 Mks.

Punishments are capital punishment, Zuchthaus or penitentiary, Gefängnis or prison, Festung or fortress, Haft or arrest, fine, Verweis or warning.

Capital punishment is executed by decapitation. Subject to it are deliberate murderers, those who attempt to murder the Kaiser or their own sovereign, those who use dynamite with the expectation of killing persons, and those who kidnap persons for the purpose of slavery.

Imprisonment in a penitentiary is either for life or from one to fifteen years. With it is always connected permanent disability to serve in the army and to take official positions. The prisoners of the penitentiary are forced to work.

The duration of a prison term is from one day to ten

years. The prisoner cannot be forced to work outside of the prison.

Confinement in a fortress presupposes that the criminal did not have a dishonest intention. (E. g. in case of duelling.) It may last for life or from one day to fifteen years. An arrest or jail-sentence involves only from one day to three months of restraint. The minimum fine is 1 M., the maximum, 15,000 Mks. Besides these punishments the convicted person may be deprived of his civil rights, placed under the supervision of the police or, as a foreigner, expelled from German territory.

The criminal acts enumerated in the second part of the Criminal Code are classified as:

1. Crimes against the state, the sovereign, public order, religion and morality. (§§ 80-184)
2. Crimes against persons, their life, honour, health, and property. (§§ 185-305).
3. Crimes against society and crimes committed in official positions. (§§ 306-359).
4. Trespasses. (§§ 360-370).

Besides the Criminal Code there exist many imperial laws which contain a punishment for criminal acts, as, e. g., the Press Law of 1874, the Dynamite Law of 1884, the Law Regulating Bankruptcy of 1899, the Espionage-Law of 1890, the Pure Food Law of 1879, and especially the "Gewerbeordnung" or "Industrial Law."

**Organization of Ordinary Courts.** The organization of Civil and Criminal Courts in the German Empire is regulated by the "Gerichtsverfassungsgesetz" of Oct. 1, 1879.

There is strictly speaking only one federal court, the "Reichsgericht" or "Imperial Court" in Leipzig, Saxony. This is the supreme court of appeal. All the other courts are courts of the several states organized upon the rules of the law mentioned before and administering justice according to the same principles, laid down by the imperial codes.

The lowest court is the "Amtsgericht." It is a civil as well as a criminal court. At the head of it is one judge, the "Amtsrichter," who decides all civil cases without any assistance. In criminal cases he is generally assisted by two lay-

men as jurors, who sit with him and vote as his colleagues. All civil cases involving a sum less than 600 Mks. have to be brought in first instance before an *Amtsgericht*. As a criminal court the jury of the *Amtsgericht* acts in all minor cases, misdemeanors, as enumerated in the law mentioned above.

The middle and higher courts are all collegial institutions, i. e. several judges as a body have the decision over cases brought before them. The "*Landgerichte*" are courts of appeal from the *Amtsgerichte* and courts of first instance in civil cases, involving more than 600 Mks., as well as in all the more severe criminal cases. In civil cases the decision rests with three judges, the *Landrichter*. For criminal cases, the *Landgericht* is divided into *Strafkammern*, or Chambers for Criminal Cases, and *Schwurgerichte*, or Jury Courts. The *Strafkammern* deal with crimes punished with a maximum of five years in the penitentiary, with recidivists, thieves, concealers and sellers of stolen goods. The *Schwurgerichte* have all other criminal cases under their jurisdiction except cases of high treason against Kaiser and Empire and cases of espionage, which are decided by the *Reichsgericht* without appeal. The *Strafkammern* are composed of five judges, the *Schwurgerichte* of three judges and twelve laymen as jurors.

In addition to these three divisions or chambers, special Chambers for Commercial Affairs or *Kammern für Handels-sachen* may be created at the *Landgerichte*. These Commercial Courts consist of one judge of the *Landgericht* and two lay members as his equal colleagues, who are proposed by the Chambers of Commerce.

Courts of appeal from the *Landgerichte*, in civil as well as criminal cases are the *Oberlandesgerichte*, of which there are twenty-nine in Germany. These courts, as well as the *Reichsgericht* are divided into *Senates* for civil cases and *Senates* for criminal cases. The *Senates* of the *Oberlandesgerichte* are composed of five judges, those of the *Reichsgericht* of seven judges. In states with more than one *Oberlandesgericht* certain cases, otherwise belonging to the *Reichsgericht*, may be transferred to one of these *Oberlandesgerichte*. Thus Bavaria since 1879 has an "*Oberstes Landesgericht*," and Prussia the *Kammergericht* in Berlin. This latter court is also the highest court for Prussian Criminal Law and for non-contentious jurisdiction.

A special department of the Kammergericht is the Geheime Justizrat, a civil court for members of the royal house.

The German system of courts is centralized in the Reichsgericht, which was created in 1869. It preserves the unity of jurisdiction in the whole Empire. If one of its Senates wishes to depart from a precedent of a previous senate it has to do so in joint meeting with the rest of the civil and criminal senates respectively. If a Senate for criminal cases wishes to deviate from the opinion of a civil Senate, or if a Senate for civil cases wishes to deviate from the opinion of a criminal Senate, it may do so only by the decision of all the different Senates.

The Reichsgericht is a third court of appeal in civil cases involving a minimum of 4,000 Mks., and receives criminal cases directly from the Strafkammern and Schwurgerichte where errors have been made prejudicial to the interest of the parties.

In disputes as to technical errors, the Oberlandesgericht has the final decision. In cases of conflict as to which set of courts, ordinary or administrative, a case has to be brought before, special courts of the several states have jurisdiction.

Besides this system of ordinary courts there are special ordinary imperial courts, the criminal courts of the navy and consular courts. The latter exist now only in very few countries and are gradually disappearing.

**Judicial Officers.** The leading officers of the German courts are professional judges. Their training is the same for the whole Empire. After graduation from a secondary school they have to study at least three years in jurisprudence (Roman law, civil and criminal law and procedure of the German Empire, constitutional and administrative law, international law, and general jurisprudence) and economics. After they have passed rigid examinations of a general and theoretical character they are admitted to the judicial career as Referendars. They are prepared in the different courts and may after three years of service be admitted to a second more practical examination. After the passage of this examination they have fulfilled the scientific qualifications for the juristic career, receive the title "Assessor," and are appointed judges if a vacancy occurs. Instructors of jurisprudence at the Universities are admitted without an examination.

Judges are appointed by the sovereigns of the several states and cannot be removed or forced to change their place without a legal process and for legal reasons. Politics do not play any part in the judicial system of Germany. The judges are absolutely independent of anybody and are expected to be absolutely impartial. The German people are justly proud of the independence and great sense of justice of their judges.<sup>11</sup>

Members of the Reichsgericht must be over thirty-five years of age. They are appointed by the Emperor.

At the head of each Collegial Court is a President, at the head of each Chamber, a Director, at the head of each Senate, a *Senatspräsident*.

The only laymen with judicial powers are the jurors of the *Amtsgerichte* and the lay members of the *Kammern für Handelssachen*. They serve without remuneration. The members of the jury of the *Landgerichte* are not judges. They decide only whether the accused is guilty or not. The judges alone decide the extent of the punishment. The jury is selected from a list of persons, who are thirty years old and have never been convicted by a court.<sup>12</sup>

Each court has a public prosecutor. The prosecutor of the *Amtsgericht* is the *Amtsanwalt* a civil service officer of the middle class. The prosecutors of the higher courts, are called *Staatsanwälte* or *Oberstaatsanwälte* at the *Landes*—and *Oberlandesgerichte* and *Reichsanwälte* at the *Reichsgericht*. They have the same training as the judges. They are, however, not as independent as the judges since they have to obey the orders of their superiors. The prosecutors are assisted by the police who have to obey their commands.

The attorneys or *Rechtsanwälte* have the same training as the judges. They assist or represent the parties before the court. An attorney who has been admitted to one court is ipso facto admitted to any court in Germany except in some cases where they are assigned to certain courts. The attorneys are, as far as their professional conduct is concerned, subject to special courts, the *Ehrengericht der Anwaltskammern* or at-

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<sup>11</sup> In the year 1912 e. g. a judge in Kadinen, East Prussia, decided against the Kaiser to the great satisfaction of the German people and was praised by the Kaiser.

<sup>12</sup> See a description of a German jury trial in the November number of this Review.

torney's court of honor in the first instance and the Ehrengerichtshof in Leipzig in the second instance. The attorneys of the Reichsgericht are admitted by the presiding board of this court and can only practice before this court.

Notaries must have the same training as judges. They are appointed by the state and are usually at the same time attorneys.

The clerical service of the courts is done by secretaries, Gerichtssekretäre, who are officers of the middle class and trained in the principles of law. They are also charged with keeping the minutes of the cases brought before a court. Other court officers are the bailiff or Gerichtsvollzieher and the Court officer or Gerichtsdienner, who have in general the same duties as these officers have in England.

The salaries and remuneration of all court officers, including the attorneys, is regulated by law.

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